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NO. 47831-5-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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SHERRY L ESCH,

Appellant

v.

SKAMANIA COUNTY PUBLIC UTILITY DISTRICT #1;  
and CLYDE D. LEACH,

Respondents

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SUR-REPLY BRIEF OF SKAMANIA COUNTY PUD  
(Proposed)

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## **I. INTRODUCTION**

For the reasons stated the PUD's accompanying motion, the PUD has filed this sur-reply brief to Esch's arguments that were stricken by this Court's March 24 order and then reasserted in the reply brief.

In her reply brief, Esch claims that Respondent Clyde Leach is a proper defendant in this PRA lawsuit because he is a "necessary party" pursuant to CR 19. This claim is without merit. Washington courts have made it clear that CR 19 cannot be used to create a substantive statutory cause of action when the statute itself does not provide for that claim. Moreover, Leach in no way qualifies as a "necessary party" under CR 19.

## **II. SUPPLEMENTAL STATE OF THE CASE**

When this lawsuit was first filed, the PUD and Leach moved to dismiss Leach because the PRA does not provide for a cause of action against an individual. Esch objected, claiming Leach was a necessary party. At first the trial court agreed, but then on summary judgment, the Court ruled changes its ruling:

The Court previous denied a motion to dismiss Dr. Clyde Leach from this case based on plaintiff's assertion that Dr. Leach was a necessary party, based on the relief Plaintiff sought, which was an independent review of Dr. Leach's computer for records related to the conduct of the PUD, and an ordered production of those records, at least for in camera review.

Order on Motions for Summary Judgment at 5:9-12 (CP 1584).<sup>1</sup>

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<sup>1</sup> The Court had ample reason to believe Esch was demanding an independent search of Leach's personal computer. See CP 1755-56 (excerpting letters at CP 1768-86 where Esch repeatedly demanded an independent search of Leach's computer).

Esch failed to raise CR 19 in her opening brief but now argues in her reply that it should control.

### **III. ARGUMENT**

When a statute provides for a cause of action against specific defendants, the courts cannot find an implied cause of action against other possible defendants. *See Griffen v. Eller*, 130 Wn.2d 58, 922 P.2d 788 (1996) (statute only allowed claims against employers with eight or more employees so court would not find an implied cause of action under the statute against employers with fewer than eight employees); see also *Crisman v. Pierce County Fire Protection District*, 115 Wn. App. 16, 24, 60 P.3d 652 (2002) (no implied cause of action when statute expressly provides for a cause of action). As established in the PUD's Response Brief, the PRA only provides for a cause of action for violating the PRA against agencies, not individuals.

Esch makes no effort to cite to any statutory language in the PRA to justify her assertion that she can bring a PRA claim against Leach. Instead, she tries to conjure a cause of action by citing to CR 19, which addresses situations where third party is considered a "necessary party" in a lawsuit. This argument fails for at least two independent reasons.

#### **A. A Plaintiff Cannot Use a Procedural Rule Such as CR 19 to Create a Statutory Right**

First, court rules, including CR 19, only govern procedures; court rules do not create substantive rights. *Port of Grays Harbor v. Bankruptcy Estate of Roderick Timber Company*, 73 Wn. App. 334, 869 P.2d 417

(1994) (“Procedural rule CR 19 simply cannot supersede the statutes and their judicial interpretations so as to create a substantive interest in property undergoing condemnation with a right to share in the condemnation award.”). Here, the PRA expressly provides for the cause of action at issue but only against agencies, not individuals. Esch cannot use CR 19 to create a substantive cause of action that is not in the statute.

**B. A Person in Possession of Public Records Is Not a Necessary Party Under CR 19 in a PRA Lawsuit**

Second, the Supreme Court has already ruled that a third party with rights in the records at issue is not a necessary party in a PRA action. *Lindberg v. Kitsap County*, 133 Wn.2d 729, 745, 948 P.2d 805 (1997) (copyright holder not necessary party to PRA action). Other decisions have routinely resolved PRA claims involving records held by third parties who were not made parties to the lawsuit. *See, e.g., Cedar Grove Composting Inc. v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 249 (2015); *Concerned Ratepayers v. PUD No. 1*, 138 Wn.2d 950, 983 P.2d 635 (1999). It is not surprising that this issue has arisen in prior cases because the PRA can apply to records that are not maintained by the agency. RCW 42.56.010(3) (defining a public record to include records “prepared, owned, used, or retained” by the agency) (emphasis added).

These cases demonstrate that Leach would not be a “necessary party” under CR 19. For example, in *Cedar Grove*, the public records at issue were obtained from the contractor by the use of a subpoena. *Cedar Grove*, 188 Wn. App. at 705. Esch could use a subpoena in this case to

obtain any public records from Leach. Leach in turn would be allowed to raise any constitutional challenges by opposing that subpoena. *See, e.g., Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004) (quashing subpoena based on assertion of First Amendment rights). Thus, it is necessary to make the custodian a party in a PRA lawsuit.

Esch's reliance on *Burt v. Department of Corrections* is misplaced because that lawsuit involved a reverse PRA claim under RCW 42.56.540, not a claim for a PRA violation under RCW 42.56.550.<sup>2</sup> Unlike section .550, the statutory language in .540 only authorizes an injunction action but does not expressly provide who should be included in such a claim. RCW 42.56.540. Moreover, the statute allows actions against a requestor. *See Soter v. Cowles Pub'g Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007). Thus, the Court in *Burt* was not using CR 19 to determine if the requestor could be sued in a reverse PRA claim; rather it was relying on CR 19 to determine whether a requestor had to be sued. This makes the analysis of CR 19 in *Burt* inapposite to whether an elected official can be sued for an alleged PRA violation under section 550.

#### **IV. CONCLUSION**

The text of the PRA creates the cause of action at issue in this lawsuit and expressly identifies who that cause of action can be made against – the “agency.” This allows Esch to sue the PUD, but not Leach. Esch cannot use a procedural court rule to expand this statutory right.

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<sup>2</sup> *Burt v. DOC*, 168 Wn.2d 828, 231 P.3d 191 (2010).

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of April, 2016.

A handwritten signature in black ink, appearing to be 'RyR', written over a horizontal line.

By: \_\_\_\_\_  
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No. 1

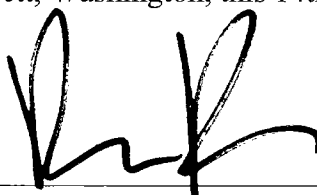


### **CERTIFICATE OF SERVICE**

I, Ramsey Ramerman, certify under penalty of perjury that true and correct copies of the above attached document were emailed to the parties below pursuant to prior agreement:

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Executed at Everett, Washington, this 14th day of April, 2016.



Ramsey Ramerman